CHAMBERS *v.* ROANOKE INDUSTRIAL & AGRICULTURAL ASS'N *et al.*

Sept. 15, 1910.

[68 S. E. 980.]

1. Municipal Corporations (§ 661*)—Streets—Closing—Municipal Authority.—In the absence of authority from the General Assembly, a city cannot authorize an agricultural association to fence in part of a public street and erect barns, etc., thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 661.*]

2. Municipal Corporations (§ 661*)—Highways (§ 165*)—Ownership.—Streets and highways belong not partially, but entirely, to the public at large, and the supreme control over them is in the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1432-1437; Dec. Dig. § 661;* Highways, Dec. Dig. § 165.*]

3. Highways (§ 692*)—Obstruction as Nuisance.—Any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 1493; Dec. Dig. § 692.*]

4. Boundaries (§ 13*)—Land on Navigable River.—The line of land bounded by the Roanoke river is the low-water mark.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 13.*]

5. Dedication (§ 63*)—Streets—Abandonment.—A dedication by recording a map of land as streets in an addition to a city was inchoate as to unopened streets, and was abrogated as to an unopened street 75 feet wide, where it was fenced 65 feet wide for several years, and has been so maintained by the public and those interested.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 103-106; Dec. Dig. § 63.*]

Appeal from Circuit Court of City of Roanoke.

Bill by one Chambers against the Roanoke Industrial & Agricultural Association and another. From decrees for respondents, complainant appeals. Reversed.

HARRISON, J. On January 16, 1906, the appelant entered into a contract in writing with the appellee, by which he agreed to sell and convey to it 10 acres of land in the city of Roanoke, the eastern line to be the line of Trueman and Plunkett, the northern line to be Pleasant avenue, the southern line to be Roanoke river, and the western line to run through the lands of appellant at such point as 10 acres surveyed will locate it. Subsequently appellant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

had the land surveyed, and in conformity with such survey executed and delivered a deed to appellee which both parties supposed contained 10 acres.

The bill in this case was filed in July, 1906, by the appellant, alleging that, shortly after the deed was executed and delivered to the appellee by him, he discovered that the tract of land thereby conveyed contained more than 10 acres as the result of a mistake in the survey which he had followed in making the deed, and that the survey by which the deed was made did not conform to the boundaries prescribed by the contract. The bill further alleged that the appellee association, claiming to act under the authority of a resolution of the city council of Roanoke, was fencing up a strip of Pleasant avenue 35 feet wide, extending the full length of the land conveyed, and that which remained in the ownership and possession of appellant, and was engaged in erecting upon that part of Pleasant avenue so fenced up sheds, stables, and other buildings to be used for fairground purposes. Appellant further alleged that the effect of this action of appellee was to deprive him of his frontage on Pleasant avenue; that said avenue was his only outlet and right of way, except with great inconvenience in distance and travel; that he occupied the property as a home; and that the sheds, stables, and other buildings being placed in the avenue for the purpose intended would amount to a nuisance, and be a menace to the health of his family, and greatly depreciate and damage the value of his property.

The bill makes the appellee association and the city of Roanoke parties defendant, and prays that each be enjoined and restrained from obstructing Pleasant avenue in the manner alleged in the bill, or in any way interfering with the right of appellant to the unlimited enjoyment of the use of the entire street or highway. The prayer of the bill, further, is that the alleged mistake in the deed executed and delivered by the appellant to the appellee association be corrected, and the deed made to conform to the intention of the parties.

The city of Roanoke answered the bill, asserting its power to authorize the fencing up of part of Pleasant avenue to be used for fairground purposes, and denying that the appellant was injured thereby. The answer of the appellee association asserts the same propositions contended for by the city of Roanoke, and claims that the tract of land conveyed to it by the appellee contained .13 of an acre less than 10 acres, and asks that the purchase price be abated accordingly.

The circuit court granted an injunction in accordance with the prayer of the bill, and subsequently, on August 6, 1906, dissolved the same. On September 21, 1908, the cause was heard on the right of appellant to have the deed reformed as prayed for, and

a decree was rendered holding that according to the terms of the contract, in pursuance of which the deed was made, the south line of the land sold was the low-water mark of the Roanoke river; and further holding that Pleasant avenue, the northern line of the land sold, was 75 feet wide, and appointing a surveyor to survey the land in accordance with the decree. From these two decrees this appeal was allowed.

We are of opinion that the court erred in its decree of August 6, 1906, dissolving the injunction theretofore granted restraining the appellee association from obstructing Pleasant avenue in the manner alleged in the bill.

The record shows that Pleasant avenue is a public highway, and, this being so, the city of Roanoke had no power or authority, in the absence of a grant from the General Assembly, to confer upon the appellee association the right to fence up any part of such highway and to erect the buildings complained of thereon. No such authority is found in its charter or the general law.

It is well settled that public highways, whether they be in the country or in a city, belong, not partially, but entirely, to the public at large, and that the supreme control over them is in the Legislature. It is also an established general rule that any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law.

The city of Roanoke having no legislative authority to grant the use of Pleasant avenue for the purposes here complained of, its ordinance was a nullity, and furnished no warrant for the act of the appellee association in fencing up one-half of this public highway and building sheds, stables, and other buildings thereon for fairground purposes. Richmond City *v.* Smith, 101 Va. 161, 43 S. E. 345.

We are further of opinion that the circuit court properly held that the southern line of the 10 acres sold by the appellant was the low-water mark of the Roanoke river, but that it erred in holding that Pleasant avenue, the northern line of the land sold, was 75 feet wide.

The appellant contends that Pleasant avenue is 65 feet wide, and we think that contention is sustained by the evidence. The effect of the conclusion that Pleasant avenue is 75 feet wide is to put its southern line in and upon the inclosed property of the appellant, a distance of 10 feet, thus making it necessary to move the western line of the land sold considerably upon the property reserved by the appellant in order to make up the 10 acres sold to appellee.

It appears from the record that the land in controversy is part of a tract of about 70 acres, which was conveyed in October, 1890,

by the Roanoke Land & Improvement Company to the Pleasant Valley Land Company. This last-named company, with the purpose of selling the land off into lots for residences, had a map prepared showing the 70 acres laid off into streets and alleys, and among other streets shown thereon was Pleasant avenue, with a width of 75 feet. This map is the basis of the claim now made that in ascertaining the northern boundary of the 10 acres sold by appellant to appellee Pleasant avenue must be held to have a width of 75 feet. The Pleasant Valley Land Company sold a few lots with reference to this map, but none of the lots so sold were near to the property involved in this controversy. Like all similar enterprises started at and about that time, the Pleasant Valley Land Company failed, and in May, 1896, reconveyed the tract of land to the Roanoke Land & Improvement Company in discharge of a large balance of purchase money secured thereon by deed of trust, making certain reservations not material in this connection. Some time before this conveyance was made, the grantor, recognizing the failure of its scheme of selling the land off in lots for building purposes, rented out a large portion of it for purposes of agriculture. In the meantime Pleasant avenue, with a width of 65 feet, was fenced on its southern side by those interested. This fence was built along the southern line of the avenue, as then established, 65 feet south of its northern line, and has remained there ever since, regarded and treated by the public, and especially by those particularly interested, as the southern line of Pleasant avenue. Since the Roanoke Land & Improvement Company reacquired the land in 1896, it has sold off a number of parcels to different parties, including both the appellant and the appellee; the parcels thus sold, lying south of Pleasant avenue, front thereon, and run to the fence, long before built, marking the southern line of that avenue.

It is not necessary to determine whether or not the map which the Pleasant Valley Land Company had made in 1890 was recorded in accordance with the statute, for, if its recordation were admitted and constituted at that time a dedication, it was never acted upon by opening the streets and alleys designated thereon for the public use, and it would be, as said by this court in a very similar case, nevertheless true that, so far as the unopened streets are concerned, the dedication was inchoate merely, and had been abrogated by subsequent events. The general purpose of the dedication has failed, the property has been sold with a view to changed conditions, and these circumstances, coupled with the continuous failure of the public, during all these years, to open and maintain these streets, together with the systematic diversion of the land included in them to uses foreign to the dedication, all

furnish unmistakable evidence of their abandonment. Any other conclusion would work great injustice to the present holders of the property.

Pleasant avenue being established and used by the public as a highway 65 feet wide with its southern line marked by a fence 65 feet south of its northern line, and upon which the 10 acres of land sold by appellant to the appellee fronts, and the southern line of the ten acres being fixed at the low-water mark of the Roanoke river, there can be no difficulty in ascertaining by survey the proper metes and bounds of the ten acres to be conveyed by the appellant to the appellee.

For these reasons, the decrees appealed from must be reversed and the cause remanded to the Circuit Court for further proceedings not in conflict with this opinion.

Reversed.

WAGGONER *v.* WAGGONER *et al.*

Sept. 15, 1910.

[68 S. E. 990.]

1. Wills (§ 782*)—Devises—Election.—Where a testator and his wife each own an undivided half interest in the homestead property and he devises the whole to her, she must elect, since she cannot claim both her estate in the property and the devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

2. Wills (§ 717*)—Acceptance of Devise or Bequest.—One who accepts a benefit under a will must accept the contents of the whole instrument conforming to all its provisions and relinquish every right inconsistent therewith.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1711-1716; Dec. Dig. § 717.*]

3. Wills (§ 781*)—Election.—To require an election under a will testator's intention to give that which is not his own must be unmistakable, but such intention need not be expressly declared, and may be gathered from the whole will.

[Ed. Note.—For other cases, set Wills, Cent. Dig. §§ 2013-2017; Dec. Dig. § 781.*]

4. Wills (§ 490*)—Defenses—Presumptions.—A testator who has only a partial interest in property devised is presumed to have in-

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.